In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, supports the petition for a writ of certiorari filed by the Interstate Commerce Commission. While nominally a defendant in the district court, the United States did not participate in

that proceeding and did not seek review in the court of appeals. Accordingly, it has no standing to petition in its own right. However, the government has a substantial interest in the issue here tendered, since it would be a statutory defendant in any action instituted by a carrier to set aside a reparations order of the Commission. 28 U.S.C. 2322. See *United States* v. *Interstate Commerce Commission*, 337 U.S. 426.

The issue presented—whether a rail carrier may bring suit against the Commission and the United States under Section 17(9) of the Act (49 U.S.C. 17 (9)) and Section 1336 of the Judicial Code (28 U.S.C. 1336) to set aside an order awarding reparations to a shipper—is of considerable importance to the Commission, to the carriers, and, above all, to the shipping community. Until this case was decided, it had generally been assumed by the carriers, as well as by the Commission, that the exclusive procedure for reviewing a reparations award was a suit for damages brought by a shipper under Section 16(2) of the Act (49 U.S.C. 16(2)). This is the first case to challenge that assumption, although several other carrier suits attacking reparations orders are now pending in the district courts. *Central Vermont Railway, Inc., et al.* v. *U. S. and ICC, Civ. 4010*, D. Vt.; *Atlantic Coast Line R. Co., et al.* v. *U.S. and ICC*, Civ. 63-145-Civ-J., M.D. Fla.; *The B&O R. Co., et al.* v. *U. S. and ICC*, Civ. 15279, D. Md.

The decision below may seriously impair the ability of some shippers to recover reparations awarded them by the Commission. If the carriers are free to bring actions such as this, shippers will almost in-

variably be denied the benefits available to them under Section 16(2) (*e.g.*, reimbursement of costs and, if successful, attorney's fees). For while the shipper may commence his action only after the carrier has refused to comply with the Commission's order, the carrier may take action to set aside the order even before the deadline for compliance has arrived. Thus, under the decision below, shippers who are not content to rely upon the Commission for the protection of their interests may be put to the burden of defending their awards in distant forums, often at a cost disproportionate to the relatively small amount at stake.

There is also serious doubt whether the decision below—one which would involve the Commission in nearly all litigation arising out of reparations awards —is consistent with the Congressional policy reflected in Section 16(12) of the Act (withholding from the Commission authority to bring suits to enforce orders "for the payment of money") and 28 U.S.C. 2321 (making the three-judge court provisions inapplicable to orders "for the payment of money"). The premise of those provisions appears to be that controversies growing out of reparations orders are unlikely to involve issues of sufficient public importance to justify the use of the three-judge procedure or to require the participation of the Interstate Commerce Commission, and that such disputes should be resolved by the interested private parties before single-judge courts. See *United States* v. *Interstate Commerce Commission*, *supra*, at 442-443.

Without attempting to elaborate upon the merits, we respectfully submit that the issue presented warrants review by this Court and that the petition should accordingly be granted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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